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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 168

SALVATORE BATTAGLIA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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QUESTION ONE

Will this Court tolerate the birth of the doctrine of "indefinite outline"—a device for extending beyond control the reach of every federal conspiracy prosecution?

The Solicitor General's response seeks to obscure this important question by two familiar techniques:

1. Guilt by Consolidation

The response is directed at petitioners Evans, Amabile, and Battaglia together, but their togetherness in the case and in some deceitful venture adds nothing to the Government's argument that Battaglia was also a partner in a conspiracy to extort by threats of violence.

2. Sufficiency of the Evidence

That spurious characterization of the question presented only highlights the importance of the question tendered: May the Government implicate a man in the violence of others, not upon evidence, but upon a legal theory that a conspiracy is of "indefinite outline", when there is also *no evidence* that any such open-ended agreement was formed.

Although it was used by both lower courts, the Solicitor General purports to read that theory out of the case, by suggesting that there was evidence of a traditional nature to support the finding that Battaglia would have tolerated violence if deceit failed. The Government's brief is replete with innuendos: that Battaglia was a "silent partner", that there was a "criminal hierarchy", that Amabile was "Battaglia's subordinate" in that hierarchy. Each of these charges leaves the critical question still open: A "silent partner" in what venture? To defraud? To extort? To kill, if necessary? In any event, however, the Government's brief is conspicuously devoid of record references for each of these insinuations. There are *no* record references, because there was *no* evidence to support these conclusions. Accordingly, the response makes all the more plain that the Government found a substitute for evidence—a novel and pernicious theory of conspiratorial responsibility.

QUESTION TWO

The Solicitor General conspicuously fails to rebut the one feature of the grand jury minutes question that calls for a hearing in this Court—the existence of a sharp and widespread conflict among the Circuits.

Instead, the response chastises the defense for refusing to accept submission of the minutes to the Court for *in camera* inspection.* Parenthetically, the defense did not affirmatively reject that suggestion. (R. 195). But more importantly, open defense access to the minutes is at the heart of the *Dennis* conflict.

QUESTION THREE

The Solicitor General seeks to avoid review of the questions raised under *Smith* v. *Illinois*, 390 U.S. 129 (1968), by contending that the court properly denied cross-examination as to Riley's residence because this was a case involving threats of violence to Riley. As to petitioner Battaglia, the attribution of violence depends upon the unwarranted theory of conspiracy challenged in Question One. And in any event, the existence of an exception for violence cases, and the hearing requirement implied by any such exception, are the very questions left open by *Smith* that call for review.

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* Curiously, the Government now simultaneously contends that the minutes contained only material to which the defense already had access. Was there then *no* governmental interest in denying disclosure at trial? Moreover, as the later disclosure of Riley's testimony shows, the grand jury minutes would have been critical to test whatever basis there was for the attribution of violence to the petitioner. (Pet. 22).

QUESTION FOUR

The Solicitor General would permit the Court of Appeals to determine the relevance of illegally monitored material in cases where that court is also called upon to conduct a full-scale evidentiary review. That suggestion reflects the improperly limited view of "relevance" the Government entertains. For even in the course of an evidentiary review, the Court of Appeals cannot assess whether the contraband material furnished "relevant" *leads* to subsequently tainted evidence.

Respectfully submitted,

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